PUBLIC PROSECUTOR v. CHEW CHOON MING & ORS.

[A.Cr.J. (K.C. Vohrah J.) March 28, 1987]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 156 of 1984]

Societies – Application for registration of society – Whether society can lawfully exist pending decision of Registrar – Societies Act 1966, ss. 2, 6(1) to (3), 7, 17, 41(b), 42, 55(c) & 56(1).

The first respondent was charged that between May 11, 1980 and September 11, 1982, at No. 10 Jalan Pira Dua, Kuala Lumpur, as an office bearer in the capacity of Spiritual Leader, he managed an unlawful society, Tiangong Baxian Holy Hall and that he had committed an offence punishable under section 42 of the Societies Act 1966. The second, third, fourth and fifth respondents were each charged for assisting in the management of the unlawful society.

The facts showed that on May 4, 1982, the Registrar of Societies received an application for the registration of a society under the name of "Tiangong Baxian Holy Hall." The Registrar of Societies rejected the said application on August 27, 1982. There was an appeal to the Minister of Home Affairs and he rejected it.

The learned Magistrate acquitted the respondents on the charges. The Public Prosecutor appealed.

Held, dismissing the appeal: (1) implicit in the provision of section 6(2) of the Societies Act 1966 is that during the period starting from the date of its inaugural meeting, shortly before application is made for its registration, until the date the Registrar approves or rejects the application of the society, a society can have existence and though not registered the existence is lawful existence. To construe that for that period it is an unlawful society is to make meaningless the provision in section 6 allowing persons to apply to the Registrar for registration or to correspond with him on behalf of the society;

(2) the terms of section 6(2) provide for the society to be dormant during the said period, but whether it is dormant or not during the period will not affect its existence as a lawful society; only that any person who is responsible for not keeping it dormant would be guilty of an offence under section 6(3) if without the written permission of the Registrar, he organises or takes part in any activity of or on behalf of the society;

(3) at the close of the case for the prosecution no evidence had been adduced to show with certainty the period the society was an unlawful society in terms of section 41 of the Societies Act 1966 in that it was a society which was not registered under section 7 after the application for its registration was rejected by the Registrar of Societies on August 27, 1982. There was also no evidence to show that the respondents were office bearers of the society after that date.

Obiter dictum: ". . . . if a presiding officer of a subordinate court has to determine a question on constitutional law, the question should not be an illusory one thrown in as a red herring. Nor should he be content with desultory submissions from police officers prosecuting the case or from defence counsel, dealing only with general statements on constitutional law without there being a proper analysis of the constitutional issues."

Cases referred to:

(1) *Sim Tiew Bee* v. *Public Prosecutor* [1973] 2 M.L.J. 200.
(2) *Yeoh Tat Thong* v. *Government of Malaysia & Anor.* [1973] 2 M.L.J. 86, 87.

CRIMINAL APPEAL.

Tan Hock Chuan and *Ng Aik Guan* (at subsequent hearing) (Deputy Public Prosecutors) for the appellant.

S. Selvanathan for the first five respondents. Sixth respondent in person.

Cur. Adv. Vult.

K.C. Vohrah J.: On the first occasion I heard arguments in this appeal I asked that further arguments be made on Article 11 of the Constitution relating to the freedom of religion since the magistrate had relied on Article 11 when she acquitted the defendants. This was done but when I went again through the appeal record and the plethora of documents admitted in the case I realised that there were far more mundane and fundamental issues which had to be looked into than the abstruse issues of constitutional law. Documents which should not have admitted in evidence had been admitted. The contents of some documents which could not be relied on were referred to during the trial by the prosecution, defence and the magistrate and in the result insufficient attention was paid to the ingredients needed to be proved by the prosecution having regard to the particulars in the charges. Statutory presumptions provided in the Societies Act 1966 (the Act) were relied upon without proof of the requisite substratum of facts. It was not a question whether the society in question was essentially a religious one and therefore did not require registration under the Act as the Magistrate held. It was a more fundamental question whether admissible evidence had made out that the society (as specified in the charges) existed at a particular period of time and whether the respondents as office bearers had managed or assisted in managing that society. And whether all these had been made out at the close of the case for the prosecution.

Chew Choon Ming, the first respondent, was

charged in the Kuala Lumpur Magistrate's Court as follows –

"That you between 11.5.80 and 11.9.82 at No. 10, Jalan Pria Dua, Taman Maluri, Kuala Lumpur, in the Federal Territory, as an office bearer in the capacity of a Spiritual Leader, managed an unlawful society, to wit, Tiangong Baxian Holy Hall, and that you have thereby committed an offence punishable under Section 42 of the Societies Act, 1966."

Five other persons, Chang Yoon Wah, Law Boon Eng, Wong Sing Lun, Cheong Wai Leong and Too Lim Peng, the other respondents in this appeal, were each charged that for a similar period and at the same place, in their office bearing capacities, in the case of the second, third, fourth and fifth respondents, as "Elders" and the sixth respondent, as "Disciple", assisted in the management of the unlawful society.

To have a correct perspective of the salient features of this case it is necessary to be aware of some undisputed facts. There is the undisputed evidence of a prosecution witness, Lam Ka Sum (PW8), that in 1976 a religious movement called the "Baitiangong" movement was started in Kepong with the first respondent, Chew, as "spiritual leader" and preacher. The expression "Baitiangong" is Mandarin for "Pray to the Creator." The symbol for this "mainly spiritual group," according to PW8, is an urn with one large joss stick and 3 small joss sticks sticking out from the urn. In the words of the witness,

"The large joss stick signifies the Creator, the small joss sticks signify Islam, Christianity and Baitiangong – all pray to the Creator."

The significance of the symbolism is that the "Baitiangong" movement is put at par with the religions of Islam and Christianity; and the intended inference is that the "Baitiangong" movement is a religious movement.

According to the witness the movement is indeed a religious movement and had 3000 followers.

The prosecution has conceded both in the magistrate's court and before me that the followers of the "Baitiangong" movement have every right to practise, profess and practise their religion in accordance with Article 11, subject only to Clause 5 thereof. But the charges refer to the "Tiangong Baxian Holy Hall." And that bring us to the expression "Tiangong Baxian Holy Hall," implying a place but which is curiously referred to as a society in the charges. The expression idiomatically translate into "Pray to the Creator Holy Hall." The charges do not refer to the "Baitiangong" movement at all; they instead refer to the "Tiangong Baxian Holy Hall" as an unlawful society.

The charges, it will be noted, thus relate to the management or assisting in the management not of the "Baitiangong" movement but of the society called "Tiangong Baxian Holy Hall."

In respect of each of the 6 charges the prosecution would have to prove that during the period from May 11, 1980, to September 11, 1982, at No. 11, Jalan Pria, Taman Maluri, Kuala Lumpur.

1) the "Tiangong Baxian Holy Hall" was a society;
2) and that it was an unlawful society;
3) that each of respondents was an office bearer in the unlawful society;
4) that as office bearer, the first respondent managed the society and that each of the other respondents assisted in the management of the society.

As to the first ingredient in the charges, that the "Tiangong Baxian Holy Hall" was a society during the specified period, it is pertinent to note that the definition of the word "society" under section 2 of the Act, relevant to this case, is, *inter alia*, "any association of seven or more persons whatever its nature or object, ..." Thus the prosecution would have to prove that the "Tiangong Baxian Holy Hall" was an association of at least 7 members. In aid of its case, however, the prosecution may rely on section 55 (a) which states that "where it is proved that. . . (an) *association* is in existence, it shall be presumed that such. . . association is a society within the meaning of this Act unless the contrary is proved." In other words, if it is proved that an association was in existence then the presumption is that it was an association of 7 or more persons within the meaning of the definition of "society" under section 2 of the Act. For a rebuttable presumption as to its existence, the prosecution may rely on the second limb of section 56(1) of the Act, on proof that certain documents and certain other things relating to or purporting to relate to that society were found in the possession, custody or under the control of any person.

As to the second ingredient, that the society was an unlawful society, the prosecution has to prove that the "Tiangong Baxian Holy Hall" was an unlawful society in terms of section 41(b) of the Act in that it was not registered under section 7 of the Act. And under section 55(c) where it is

alleged that a society is an unlawful society the burden of proving that it is registered lies on the person charged.

As to the third ingredient, there has to be proof that each and every respondent was an "office bearer" in the said society. Under section 2 of the Act "office bearer of a society" means, so far as is relevant,

"any person who is the president or vice-president, or secretary or treasurer of such society . . . , or who is a member of the committee or governing body thereof . . . , or who holds in such society. . . any office or position analogous to any of those mentioned above;"

In this case the prosecution would have to show that the office of "Spiritual leader" or "Elder" or "Disciple" is analogous to one of the offices named or described in the definition.

Before proof of any of respondent's office it would of course be necessary to show that the respondent was a member of the society. The prosecution may rely on the rebuttable presumption in section 56(1) of the Act, that if the respondent was found in possession, custody or control of any of the documents or things mentioned therein, then the respondent was a member of such a society.

As regards the fourth ingredient, the prosecution would have to adduce facts to show that the first respondent in his office bearing capacity managed the unlawful society.

So far as the other respondents are concerned the prosecution would have to adduce evidence to show that they assisted in the management of the society in their office bearing capacities. The prosecution may rely on the presumption in section 56(2) which states that where certain documents or things relating to the society are found "in the possession, custody or control of any person, it shall be presumed until the contrary is proved that such person assists in the management of such society."

I have set out at same length the ingredients needed to be proved and the presumptions which can be relied on by the prosecution in this case. I have done so because not much attention has been placed on these ingredients of the charges by the magistrate when she called upon the respondents to make their defence. On the other hand the prosecution relied on some presumptions where they could not have done so because the prerequisite facts which give rise to these presumptions were not proved.

It is not disputed that on May 4, 1982, the Registrar of Societies received an application for the registration of a society under the name of "Tiangong Baxian Holy Hall." The application was made under section 6(1) of the Act. The evidence of a former member of the "Baitiangong" movement, PW8, was that on April 12, 1982, an inaugural meeting of this society was held to facilitate the registration of the "Tiangong Baxian Holy Hall." Clearly therefore on the evidence of this prosecution witness the "Tiangong Baxian Holy Hall" society could not have had any existence before May 4, 1982, certainly not from May 11, 1980, as specified in the charges.

The Registrar of Societies rejected the application to register the society on August 27, 1982. It seems there was an appeal to the Minister of Home Affairs and he rejected it. The application and the appeal were made by purported office bearers of the society. It is provided under section 6(2) that until a local society (for our purposes, a society organised and established in the Federation – see section 2) is registered no person shall, without the written permission of the Registrar, organise or take part in any activity of or on behalf of the society, except only to apply to, or correspond with the Registrar. Thus implicit in the provision is that during the period starting from the date of its inaugural meeting, shortly before application is made for its registration, until the date the Registrar approves or rejects the application of the society, a society can have existence and though not registered the existence is lawful existence. To construe that for that period it is an unlawful society is to make meaningless the provision in section 6 allowing persons to apply to the Registrar for registration or to correspond with him on behalf of the society. The terms of section 6(2) provide for the society to be dormant during the said period, but whether it is dormant or not during the period will not affect its existence as a lawful society; only that any person who is responsible for not keeping it dormant would be guilty of an offence under section 6(3) if, without the written permission of the Registrar, he organises or takes part in any activity of or on behalf of the society (except to apply to, or correspond with the Registrar as previously noted).

Coming back to the facts of the case, during the period from May 4, 1982, the date of the inaugural meeting of the "Tiangong Baxian Holy

Hall", until the date the Registrar rejected the application, August 27, 1982, the society was lawfully in existence although not registered.

If any of the respondents had organised or taken part in any activity of or on behalf of the society except to apply or correspond with the Registrar he would have committed an offence under section 6(3), not for an offence of managing an unlawful society or assisting in the management of an unlawful society.

According to PW1 an appeal was made to the Minister of Home Affairs against the refusal of the Registrar to register the society. But that is hearsay. Thus it would appear that since the society existed even after the date the Registrar refused to register it, the society ceased to be lawful after the date of refusal. It should have been wound up under section 17 of the Act but no evidence was available to show whether steps under section 17 were taken.

Coming back to the period specified in the charges – we now have the situation that the period specified in the charges against the respondents should have been reduced to a period of about only 1 month *i.e.* from August 28, 1982, the date following the date of rejection by the Registrar, up to September 11, 1982, the date as specified in the charge, if the latter date can be accepted.

What then is the evidence of the prosecution on the essential ingredients of the charges for the period of August 28, 1982 to September 11, 1982?

As to the first ingredient that the "Tiangong Baxian Holy Hall" was a society during the period there is the evidence of the Deputy Registrar (PW1) that an appeal was made on behalf of the society to the Minister of Home Affairs against the decision of the Registrar refusing to register the society. There is no indication, however, when this appeal was made nor who made the appeal on behalf of the society.

PW1 said that the Minister rejected the appeal in a letter. A letter purportedly written by an official on behalf of the Minister was produced but clearly that letter (P7) produced by PW1 is inadmissible as the official who wrote the letter was not called to tender it. There being no admissible evidence of any appeal by the "Tiangong Baxian Holy Hall" to the Minister or its rejection by him what then is the nature of the evidence that after the Registrar's rejection the society continued to exist from August 28, 1982, to September 11, 1982. I have examined the evidence of other prosecution witnesses and gone through the admissible documents produced by the prosecution in order to determine this period but I have not been able to determine this period with any certainty but I do note that from the minutes of meetings (P32) kept of the "Baitiangong" movement by PW8 that there was a meeting of "the 6th Baitiangong Council Congregation", which according to P32 was held on September 11, 1982 "at the abovementioned address." The "abovementioned address" as shown in the minutes in P32 is "Tiangong Baxian Holy Hall," a place, not a society. The prosecution has relied on the said date shown in the minutes for their charges but I am unable to draw any conclusion that the "Tiangong Baxian Holy Hall" existed on September 11, 1982.

Great reliance was placed on documentary evidence. The trial, in fact, was characterised by an over-abundance of documents, the contents of most of which were inadmissible. These documents were seized by police officers on three separate raids on 3 houses, the last raid being on the address mentioned in the charges. Though produced in Court, save for some documents to which I shall refer later, the bulk of the documents should not have been relied upon by the magistrate as their contents were inadmissible. The authors of these documents were not called nor were circumstances shown under section 32 of the Evidence Act 1950 to make them admissible (see *Sim Tiew Bee* v. *Public Prosecutor*[11]). And the Court is not entitled to rely on the special rule of evidence in section 51(3) of the Act in the circumstances of this case. Section 51(3) states that in a prosecution of a society of an office bearer or any person managing or assisting in the management under section 51(1), "any document found in the possession of an office bearer of such society or of a person assisting in the management of such society or of a member of such society or in any place leased, rented, borrowed, used or controlled by such society shall be *prima facie* evidence of the contents thereof for the purpose of proving that anything has been done or purports to have been done by or on behalf of the society."

The Court cannot rely on section 51(3) because none of the documents seized in the 3 raids was found in the possession of any of the respondents nor was there any evidence that any of the three places raided and in which the documents were found was leased, rented, borrowed, used or controlled by "Tiangong Baxian Holy Hall."

The documents that I can rely on are P65,

P62 and P32 which relate to the minutes made of the meetings of the "Baitiangong" movement by PW8. PW8, as I had mentioned earlier, was a former adherent of the "Baitiangong" movement and his evidence was that during the period May 11, 1980 to September 11, 1982, as specified in the charge he was in the "Baitiangong" movement and the elder of administration (*i.e.* secretary). His evidence was that he kept minutes of the meetings of the movement till September 11, 1982, in P65 and formal minutes were made in P62 and P32. The minutes in his handwriting in P65 as elaborated in the typewritten version (P32) show, as stated earlier that it was a meeting of "the 6th Baitiangong Council Congregation" held at the address of Tiangong Baxian Holy Hall. The reference to "Tiangong Baxian Holy Hall" as a place as I have stated before is not evidence that the society was in existence on September 11, 1982.

Thus as regards the second ingredient that it was an unlawful society from the period August 28, 1982, to September 11, 1982, in the sense that it existed after being refused registration under section 7 of the Act, I am unable to see that the ingredient has been made out.

Even if that ingredient has been made out, when we come to the third ingredient – that the respondents were office bearers in the unlawful society – search as I did I could find no evidence that they were office bearers of the "Tiangong Baxian Holy Hall" during that period. There was no evidence by PW8, PW10 (Liew Peng Wah) or PW11 (Chee Thong Yew), all former adherents of the "Baitiangong" movement, or from anybody else that the respondents were office bearers of the "Tiangong Baxian Holy Hall". And the prosecution cannot rely on the presumption in section 56(1) of the Act in respect of the documents seized by the police to show that the respondents were members of that society or that they assisted in the management of the society; there is no evidence to show that any of the documents seized by the police in the three raids, earlier alluded to, was in the possession, custody or control of any of the respondents.

To my mind there being no evidence that any of the respondents were office bearers or for that matter members of the "Tiangong Baxian Holy Hall" another essential ingredient of each of the offences has not been made out at the close of case for the prosecution.

Thus at the close of the case for the prosecution no evidence had been adduced to show with certainty the period the society was an unlawful society in terms of section 41 of the Act in that it was a society which was not registered under section 7 after the application for its registration was rejected by the Registrar of Societies on August 27, 1982. But more importantly, no evidence was adduced to show that the respondents were office bearers of the society after that date.

One disquieting feature I note in the trial below is that the magistrate was side-tracked into dealing with a constitutional issue. She should have properly been addressed on the evidence and the law relating to the Act where she could have scrutinised the charges against the appellant to see if the charges had been made out on a *prima facie* basis at the close of the case for the prosecution. This is not to say that subordinate courts have no right to determine any question affecting provisions of the Federal Constitution; they do, for in the words of Azmi L.P. in *Yeoh Tat Thong* v. *Government of Malaysia & Anor.*[2] ". . . it is my view that the High Court and indeed subordinate Courts have jurisdiction to determine any question affecting the provisions of the Federal Constitution, except where the matter comes under Article 4." In fact a presiding officer of a subordinate court has discretion to determine a question arising as to the effect of the Constitution or to refer the matter to the High Court in accordance with section 30 of the Courts of Judicature Act 1964. If all the ingredients in the charges had been made out the magistrate then would have been justified in dealing with the constitutional issues at the close of the prosecution case. But if a presiding officer of a subordinate court has to determine a question on constitutional law, the question should not be an illusory one thrown in as a red herring. Nor should he be content with desultory submissions from police officers prosecuting the case or from defence counsel, dealing only with general statements on constitutional law without there being a proper analysis of the constitutional issues.

Although I do not agree with the reasons of the Magistrate for her acquittal of the respondents, I agree they should have been acquitted on the charges for the reasons I have given and I accordingly dismiss the appeal of the Public Prosecutor against the acquittal of all the respondents.

Appeal dismissed.

Solicitors: *Thevin Chandran Siva Wong & Jamal.*